

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218230 **DATE:** May 31, 1985
MATTER OF: W.G. James, Inc.

DIGEST:

Where firm submits three copies of its bid, each with a total price of \$820,000; prices masonry work at \$495 on two copies and \$4,495 on the third; and claims that \$495 was intended and that the total bid should be \$816,000 (\$820,000 incorporates the \$4,495 figure), it is not clear what the bid actually intended was, particularly since \$4,495 is consistent with the other four bidders' prices for the work.

W.G. James, Inc. (James), protests award of a contract to Certified Mechanical Contractors, Inc. (CMC), under invitation for bids (IFB) No. 2994 issued by the Federal Bureau of Investigation (FBI) for construction services for secure communications renovation of the FBI's Chicago Field Office. James, which was tied with CMC as the apparent low bidder, complains that CMC was permitted to correct its bid downward.

We sustain the protest.

Each bidder was required to submit three copies of the bidding documents, which were bound in a Bidding Submittals Booklet. Although award was to be based on low total price, appendix "B" to the solicitation, entitled Base Bid Price Breakdown, provided for the listing of prices by divisions. Each of the 16 divisions covered a type of material and labor, including overhead and profit, within the scope of the work to be performed.

James and CMC submitted total bids of \$820,000. However, review of the three copies of appendix "B" submitted by CMC disclosed a discrepancy in division four, covering the price for masonry work. On two of the copies, the amount for division four was listed as \$495; whereas, on the third copy, the price for division four was listed as \$4,495. At the \$495 figure, the total bid would be \$816,000

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and would be the low bid. At the \$4,495 figure, the total bid is \$820,000 as bid on each of the three copies of CMC's bid. The other four bidders listed \$4,500, \$5,000, \$7,000 and \$7,900 (James) for the division four masonry work.

In response to an inquiry by the FBI, CMC advised that \$495 was the intended price for the division four work and that the total bid should be \$816,000. In support, CMC submitted a copy of its masonry takeoff and pricing sheet, dated the same date as bid opening, showing \$495 as the price for masonry. The FBI also contacted the architectural firm that had prepared the plans for the construction and was told that this firm estimated the price for the masonry work on division four to be \$470. Finally, the FBI field office engineer computed the probable cost of the masonry work from a standard industry guide and advised the contracting officer that a price of \$495 was reasonable. The FBI considered the evidence to be clear and convincing of the mistake and the bid intended; permitted CMC to correct its bid; and awarded the contract to that firm as low bidder.

James complains that the FBI used evidence outside CMC's bid to permit correction. In this regard, the procurement regulations provide that a determination may be made to permit a bidder to correct a mistake if clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, except that if this correction would result in displacing one or more "lower bids," the mistake and the bid actually intended must be ascertainable substantially from the solicitation and the bid itself. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406 (1984). James further contends that in view of the other four individual prices quoted for the masonry work, the \$4,495 amount was the only reasonable interpretation of the conflicting figures. James asserts that the masonry subcontractor it intended to use for the division four work has advised that it quoted both CMC and James a price of \$4,495. At best, James argues, the bid should have been rejected as ambiguous.

The FBI justifies resort to CMC's masonry worksheet by the fact that the regulations only preclude such evidence where a lower bidder will be displaced; whereas, here, FBI points out, there is a tie bid situation. The FBI also argues that, even where a lower bidder would be displaced,

an agency may consider extrinsic evidence over which the bidder has no control, like the architectural firm's and the FBI engineer's post-bid-opening estimates, which the FBI asserts provide clear and convincing evidence of the mistake and the intended bid. The FBI discounts the other four bidders' prices for the masonry work because the masonry work accounts for only about 0.0006 percent of the cost of the project, and such a small job thus might be performed either by the prime contractor or subcontracted, so that considerable price variation might be expected. Finally, as to the alleged masonry subcontractor quotation of \$4,495 to both James and CMC, the FBI notes that James actually priced the work at \$7,900 and suggests CMC may well have received a lower quotation than the one alleged by James.

Even considering CMC's masonry worksheet and the two post-bid-opening estimates for division four, we cannot agree with the FBI that the evidence clearly and convincingly establishes that CMC meant to bid \$495 for the division four work. The total bid CMC entered on each of the three copies of the bid was \$820,000, which includes the \$4,495 figure, and on one the firm entered a price for division four of \$4,495. While the two estimates are closer to the allegedly intended price of \$495, it is significant that the price alleged to be in error is much more in line with the prices of other actual bidders on the IFB: \$4,500, \$5,000, \$7,000, and \$7,900. Under these circumstances, we think it just as likely that CMC intended to bid the total it actually entered, \$820,000, as the total it alleges it really meant, \$816,000. We therefore believe the evidence of the allegedly intended bid was not clear and convincing, so that correction of the bid downward was improper.

Generally, where a bid price is subject to two reasonable interpretations and the bid would be low under only one of them, the bid must be rejected. See Hudgins Construction Co., Inc., B-213307, Nov. 15, 1983, 83-2 C.P.D. ¶ 570. Here, however, except for the correction of CMC's bid, the award of the contract would have been determined in accordance with the tie-bid provisions of FAR, 48 C.F.R. § 14.407-6, under which priority is given in the following order: small business labor surplus area concerns; other small businesses; and other labor surplus area concerns. The regulation further provides that if two or more bidders remain equally eligible even then, award is determined by drawing lots. Since the FBI advises that neither CMC nor James would have been entitled to a

priority, so that the award would have been determined by lot, CMC still would have had a chance at award even at \$820,000.

We therefore are recommending to the FBI that award of the contract be redetermined by lot in accordance with the provisions of FAR, 48 C.F.R. § 14.407-6; if James wins by lot, the contract with CMC should be terminated for the convenience of the government and reawarded to James.

We point out that our recommendation is made without regard to the extent of contract performance to date, since performance has proceeded despite the protest filing. Where, as here, a federal agency receives, within 10 days of the date of contract award, notice of a protest filing^{1/} under the statutory bid protest provisions at 31 U.S.C. § 3551-3556, as added by the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1199 (1984), the agency must suspend performance of the contract until the protest is resolved. 31 U.S.C. § 3553(d)(1). The only exceptions are where the head of the responsible procuring activity makes a written finding that either contract performance is in the best interest of the United States, or there are urgent and compelling circumstances significantly affecting the interests of the United States which do not permit waiting for a decision, and so notifies this Office. 31 U.S.C. § 3553(d)(2)(A), (B). Further, the statute requires that our Office, in making a recommendation in connection with the resolution of a bid protest, disregard any cost or disruption from terminating, recompeting, or reawarding the contract if the head of the procuring agency determined to proceed with contract performance. 31 U.S.C. § 3554(b)(2). Not only did the FBI not suspend performance in this case but, in fact, we are not aware that the procuring activity head even made the requisite finding to authorize continued performance.

Accordingly, we make our recommendation irrespective of any factors other than that the contract award was improper.

^{1/} The contract was awarded on February 20; James filed the protest in our Office on February 25; and we notified the FBI of the filing on that same date.

Should the FBI fail to adopt our recommendation, we declare James to be entitled to the costs of filing and pursuing the protest, including reasonable attorney's fees, and the costs of preparing its bid in response to the solicitation, as expressly authorized by statute. 31 U.S.C. § 3554(c)(1); see also our Bid Protest Regulations implementing that authority, 4 C.F.R. § 21.6 (1985).

The protest is sustained.

for *Milton J. Forster*
Comptroller General
of the United States